Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1363

In the Supreme Court of the United States

October Term, 1988

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Petitioner

vs.

STATE FARM INSURANCE COMPANY,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MORRIS M. SHUSTER, P.C.
MORRIS M. SHUSTER,*
WILLIAM D. MARVIN
Attorneys for Petitioner
**Counsel of Record*

22nd Floor, PSFS Building
Twelve South Twelfth Street
Philadelphia, PA 19107
(215) 922-1300

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

TABLE OF CONTENTS

	PAGE
Rule Involved	1
Argument:	
I. Introduction	2
II. Rule 1926 provides a mechanism for substantive corrections to the record; it does not impose a duty on parties to supervise the ministerial functions of Court clerks	3
III. No tort remedy can redress the due process deprivation in this case	5
Conclusion	6

TABLE OF CITATIONS

CASES:	
Parrat v. Taylor, 451 U.S. 527, 68 L.Ed.2d 240, 101 S.Ct. 1908 (1981)	5
Petticord v. Joyce, 516 Pa. 35, 531 A.2d 1383 (1987)	5
STATUTE:	
42 Pa. C.S. §§8522, 8544	5
RULES:	
1 Pennsylvania Appellate Practice:	
§1921:1-:6	4
§1921:7	4
§1921:10	5
Pa. R.A.P.:	
1921	2
1926	1, 2, 3
1931	2

RULE INVOLVED

Rule 1926 of the Pennsylvania Rules of Appellate Procedure states:

> If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court after notice to the parties and opportunity for objection, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

ARGUMENT

I. Introduction

The essential argument of Respondent State Farm is that Petitioner violated a procedural duty under state rules, and that this justified the forfeiture of his constitutional rights [Brief in Opposition, 4]. This assumes that the state rules impose such a duty, but they do not.

The Petition for Certiorari discussed how the Pennsylvania Superior Court cited *only* Pennsylvania Appellate Rules 1921 and 1931, which impose duties *only* on the lower Court, judge and clerk [Petition, 23-26]. Instead of discussing these rules, State Farm has cited Rule 1926, "Correction or Modification of the Record." Because the Brief in Opposition failed to quote the actual language of this rule, Rule 1926 is reproduced above in its entirety.

Argument

II. Rule 1926 Provides A Mechanism For Substantive Corrections To The Record; It Does Not Impose A Duty On Parties To Supervise The Ministerial Functions Of Court Clerks

A. Nothing in Rule 1926 imposes a duty of inspection or supervision on parties.

Rule 1926 contains three sentences, which provide a wide set of options to resolve controversies which may arise with respect to the record. Each sentence assumes the existence of some dispute or question:

> "If any difference arises . . . [the record shall be corrected by the lower court]. If anything material to either party is omitted . . . [the record shall be supplemented or corrected]. All other questions as to the form and content of the record shall be presented to the appellate court."

Rule 1926 does not address the manner in which the record is indexed and numbered. Instead, it is designed to "correct misstatements or cure omissions." 1 Pennsylvania Appellate Practice §1926:1, at 513. By its terms, when this Rule is invoked, the exclusive remedy for any errors or omissions is correction.

Rule 1926 contains no suggestion that parties have an affirmative, mandatory *duty* to seek out and correct technical mistakes of the lower Court clerk, on pain of dismissal for the Court's own clerical omissions.

The Pennsylvania Superior Court did not invoke or even cite Rule 1926. In Mr. Neyhard's appeals, there was

no substantive or factual controversy about the record: both appeals were fully briefed on legal issues without any dispute about the accuracy of the record or the facts below.

B. The secondary source cited by State Farm is irrelevant.

State Farm cites, as the *only* authority for its assertion, that Mr. Neyhard had a duty to oversee the clerk's performance, the advice of a secondary source [Brief in Opposition, 4, citing 1 Pennsylvania Appellate Practice §1921:7, at 517].[1] This advice is labeled as a "practice note," following sections which describe how Rule 1926 provides a mechanism for correcting substantive errors. *Id.* §§1921:1-:6. The text's discussion does not state that counsel must monitor the lower Court clerk's formal tabulation and indexing, and certainly does not impose a duty of supervision on litigants.

This commentary describes the following remedy for an incomplete record.

> Where the record on appeal is incomplete, and the omission or omissions are material, the appellate court will either remand the case to the trial court to supplement the record, or retain jurisdiction of the case but direct that the trial court remedy the omission within a specified period of time. Where the omission is not deemed to be material, the appellate

---

[1] This text was first published *after* the Superior Court ruling in this case on September 25, 1986. The publisher, Lawyer's Cooperative Publishing Company, has informally advised Petitioner's counsel that actual publication was in November or December, 1986.

court may attempt to decide the case on the basis of the incomplete record.

1 Pennsylvania Appellate Practice §1921:10, at 488-89 (footnotes omitted). Notably absent from this text is any suggestion that a party could suffer the ultimate sanction of dismissal for errors which originated with the court clerk.

III. No Tort Remedy Can Redress The Due Process Deprivation In This Case

---

State Farm raises the possibility of a tort remedy against the judicial system, citing *Petticord v. Joyce*, 516 Pa. 35, 531 A.2d 1383 (1987). The fallacy in this argument is that any such remedy would be precluded by governmental immunity, codified in Pennsylvania statutes. In *Petticord*, the Pennsylvania Supreme Court noted that the defendant had failed to plead the state immunity act, and hence it would not be considered. 516 Pa. at 36 n. 2, 531 A.2d at 1383 n. 2. These statutes generally bar tort claims against government employees, whether state or local, with specified, narrow exceptions, none of which embrace the facts in this case. 42 Pa. C. S. §§8522, 8544.

The deprivation in this case, where Petitioner was denied the very quantum of Due Process defined by a state's own Constitution, statutes and Court rules, for the sole reason that a Court clerk violated those rules, is hardly comparable with the negligent loss of a prisoner's hobby kit in *Parrat v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981). The judicial process for obtaining substantive legal rulings on the merits is the essence of Due Process; its unjustified deprivation cannot be tolerated

even if money damages were available. Restoration of Mr. Neyhard's constitutional rights by this Court is the appropriate remedy.

CONCLUSION

Petitioner requests that this Court issue a Writ of Certiorari to the Pennsylvania Superior Court, so that his appeals may be reinstated and decided on their merits.

Respectfully submitted,
MORRIS M. SHUSTER, P.C.
MORRIS M. SHUSTER*
WILLIAM D. MARVIN
Attorneys for Petitioner
**Counsel of record*

22nd Floor, PSFS Building
Twelve South Twelfth Street
Philadelphia, PA 19107
(215) 922-1300